Unites States v. Romay-Cruz, No. 04-30455

ALARCÓN, Circuit Judge, dissenting:

I respectfully dissent. The record shows that Mr. Romay-Cruz expressly stipulated that the state trial court could consider the police officer's affidavit in determining whether there was a factual basis for his plea of guilty. The arresting officer alleged in his affidavit that Mr. Romay-Cruz "took a fighting stance and immediately took a swing with his right fist striking the center of my flashlight that I held in my hand."

Appellant argued in his opening brief that he was not guilty of third degree assault because "[t]he facts in the affidavit do not clearly establish that Mr. Romay-Cruz plead guilty to all the requisite facts necessary to establish that he applied force or actual violence to *body of another*." Appellant's Opening Br. at 15 (emphasis added). In its responsive brief, the Government adopted the district court's conclusion that "taking a swing with his right fist, whether it struck him [the police officer] or didn't, and happened to hit his flashlight, would be within the crime of violence."

For the first time, in his reply brief, Appellant refers to

> "a statement purportedly written by Mr. Romay-Cruz, though he neither speaks nor writes much English, that states: 'I was drunk and I don't remember.' Mr. Romay-Cruz only agreed that the court could review the affidavit of probable cause in determining the *factual basis* for the

plea, not that he explicitly adopted those facts."

Appellant's Reply Br. at 7.

The argument, that Mr. Romay-Cruz was drunk and did not remember the incident, seized upon by the majority to support its conclusion that the record does not support a finding that he was convicted of a crime of violence, was not presented to the district court. The majority's consideration of this issue is contrary to the law of this circuit which provides that "[i]ssues not presented to the district court cannot generally be raised for the first time on appeal." *United States v. Robertson*, 52 F.3d 789, 791 (9th Circ. 1994). Thus, this issue was forfeited by the failure to present it to the district court.

Furthermore, the argument was not presented to this court in Mr. Romay-Cruz's opening brief. "The general rule is that appellants cannot raise a new issue for the first time in their reply briefs." *Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980); *accord United States v. Reyes-Platero*, 224 F.3d 1112, 1115 (9th Cir. 2000).

The failure to present an issue to the district court precludes it from directing opposing counsel to present further evidence or respond with pertinent legal authority to assist it in reaching the correct result. The failure to present a potentially dispositive contention in an opening brief unfairly robs an Appellee of the opportunity to present relevant authority or to point to the record in an attempt

to persuade this court that it should reject Appellant's argument.

Regrettably, the majority has failed to explain why it has ignored the dual jurisdictional barriers to considering the merits of an issue not presented to the district court, or in Mr. Romay-Cruz's opening brief. Because the issue relied upon by the majority as dispositive was forfeited by the failure to present it to the district court, and raised for the first time in the reply brief, I would decline to consider it. I would affirm the sentence imposed by the district court.